87-1361
No.

Supreme Court, U.S.
FILED
FEB 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RALPH DIAMOND, BENJAMIN F. NOLAN, SAMUEL GREENSTEIN, BARBARA KAISER, and BENJAMIN GLASS, individually and on behalf of all others similarly situated,

Appellants.

vs.

MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, State Comptroller, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, ALBERT M. ROSENBLATT as Chief Administrative Judge of New York State Office of Court Administration, THE NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, WESTCHESTER COUNTY BOARD OF ELECTIONS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the application of a mandatory retirement provision to elected judges, but not to appointed judges who serve in the same capacity, violates the equal protection clause?

2. Whether "age" should now be considered a "suspect class" or "quasi-suspect class" as a result of the recent amendment to the Age Discrimination in Employment Act which now prohibits any discrimination in employment on account of age?

3. Whether the exclusion of elected officials from the age protections of the ADEA justifies the disparate treatment of judges for mandatory age retirement purposes on the basis of whether they were elected or appointed?

PARTIES

The parties are set forth in the caption herein. By stipulation between the parties Judges Louis Grossman, James P. Griffin and H. Buswell Roberts were added as plaintiffs. There are no corporate affiliations.

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Respondents.

On Appeal from the Court of Appeals
of the State of New York

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, County of Kings was reported at New York Law Journal, Sept. 3,

1987, at p. 15, col. 3 and is set forth in the appendix, infra, p. 57-a.

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department (hereinafter "Appellate Division) is reported at 130 A.D.2d 292, 519 N.Y.S.2d 691 (2d Dep't 1987) and is set forth in the appendix, infra, p. 12-a.

The opinion of the Court of Appeals of the State of New York (hereinafter "Court of Appeals") is reported at 70 N.Y.2d 338, 520 N.Y.S.2d 732, 514 N.E.2d 1356 (1987) and is set forth in the appendix, infra, p. 1-a.

GROUNDS OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this appeal drawing into question the validity of Art. VI, §25(b) of the New York State Constitution, infra, p. 86-a and the New

York State Judiciary Law §23 infra, p. 85-a (hereinafter collectively the "mandatory retirement provisions"), which mandate the retirement of all judges who reach the age of 70, on the ground that as applied to the appellants, they are repugnant to the Constitution of the United States.

Alternatively, this Court is asked to accept jurisdiction of this matter pursuant to 28 U.S.C. §1257(3) as a petition for writ of certiorari.

The federal Age Discrimination in Employment Act (hereinafter "ADEA"), 29 U.S.C. §§ 623(a) and 630(f), as amended January 1, 1987, prohibits discrimination in employment on account of age, (with certain exceptions not relevant to this appeal) but its coverage does not apply to employees who are "elected to public office in any State or political subdivision."

In May, 1987, the Administrative Board of the Courts of the State of New York (hereinafter the "Administrative Board") ruled that because of the exemption, elected judges, such as appellants, were not protected by the ADEA from the mandatory retirement provisions, but that those who are appointed are permitted to serve until the expiration of their appointed terms irrespective of age.

The New York State Supreme Court declared the mandatory retirement provisions unconstitutional under the equal protection clause of the United States Constitution as applied to the appellants on the ground that "the subject edict arbitrarily treats similarly situated judges differently, in a discriminatory manner without a rational basis to support the disparate treatment...."

On appeal, the Appellate Division reversed and granted respondents' motion to dismiss the complaint.

The Court of Appeals affirmed the ruling of the Appellate Division on October 15, 1987.

Timely notice of appeal to this Court was filed in the Court of Appeals on November 6, 1987 and in the New York Supreme Court on November 6, 1987. This Court, pursuant to the order of Associate Justice Thurgood Marshall, extended appellants' time to docket this appeal to and including February 13, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Art. VI §25(b) of the New York State Constitution provides in pertinent part, as follows:

> Each judge...shall retire on the last day of December in the year in which he reaches the age of seventy.

New York State Judiciary Law §23 provides in pertinent part:

> No person shall hold the office of judge...longer than until and including the last day of December next after he shall be seventy years of age....

ADEA, 29 U.S.C. §623(a) provides, as follows:

> It shall be unlawful for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

ADEA, 29 U.S.C. §630(f) provides, as follows:

> [T]hat the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof....

STATEMENT

The appellant, Benjamin Glass (hereinafter "Glass"), is a New York Supreme Court Justice who was elected to serve until December 31, 1994 but was mandatorily retired December 31, 1981 because he reached age 70, and was certified to serve in office for three additional terms of two years each until the end of 1987.

Appellants Benjamin Nolan and Louis Grossman (hereinafter "Nolan" and "Grossman") were elected New York City Civil Court judges for ten-year terms which expire at the end of 1992 and 1988, respectively. Appellants Barbara Kaiser

and Ralph Diamond (hereinafter "Kaiser" and "Diamond") were elected in Westchester and Nassau Counties, respectively, as New York State Family Court Judges for ten-year terms which expire at the end of 1992 and 1995, respectively. Kaiser and Diamond became age 70 during 1987. Within the City of New York, Family Court Judges are appointed for ten-year terms.

Appellant Samuel Greenstein (hereinafter "Greenstein") who is age 65, is an elected New York City Civil Court judge whose ten-year term expires at the end of 1989.

On May 26, 1987, the Administrative Board notified all judges in the State that the ADEA prohibits the involuntary retirement of appointed judges during their terms of office but does not similarly protect elected judges because of their

exclusion under the ADEA. Therefore, the appellants (other than Greenstein) and all other judges who reached age 70 in 1987 were compelled to retire on December 31, 1987.

Appellants brought these proceedings upon the sole theory that the Administrative Board's application of the New York State mandatory retirement provisions as interpreted under the provisions of the ADEA, violates their rights to equal protection of law under the United States Constitution. Specifically, it is appellants' position: that there is no rational basis under equal protection standards for distinguishing between elected judges and appointed judges who reach the age of 70; that age is now a "suspect" class or "quasi-suspect" class by virtue of the ADEA amendment which

expressed the national intention to omit age as a consideration in employment, thereby raising the standard of constitutionality to "strict scrutiny."

Family Court judges from outside the City of New York, such as appellants Diamond and Kaiser, are elected to ten-year terms; their counterparts within the City of New York are appointed to similar ten-year terms. Under the Administrative Board's ruling, Diamond and Kaiser, who perform the very same functions as New York City Family Court judges, are compelled to retire at age 70, although those who serve in New York City may remain in office until the expiration of their terms, irrespective of age.

All of the appellants including Nolan, Grossman and Greenstein who are elected to ten-year terms as New York City Civil Court

judges, sit as acting Supreme Court Justices in the exact same way as do New York City Criminal Court judges who are appointed to ten-year terms. Nevertheless, under the Court of Appeals' interpretation of the ADEA, the mandatory retirement provisions apply to the appellants but not to the Criminal Court judges who serve on the same panel.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

At the New York Supreme Court, the appellants claimed that the mandatory retirement provisions were unconstitutional as applied to them. Justice Franklin Morton found in, Diamond v. Cuomo, New York Law Journal, Sept. 3, 1987, at P. 15, col. 3, that the mandatory retirement provisions as applied to appellants

violated equal protection rights under the Constitution.

> The resultant indiscriminate classification between elected and appointed judges for purposes of retirement seems to lack any rational basis in law or in logic. The rule has often been stated that the classification must rest upon some ground of difference having a fair and substantial relation to the subject of the legislation (Royster Guono Co. v. Virginia, 253 US 412, 415; Louisville Gas and Electric Co. v. Coleman, 277 US 32, 37; Allied Stores v. Bowers, 358 US 522, 527). The attempted classification herein seems purely arbitrary, not rationally related to the achievement of a legitimate state purpose, i.e., mandatory retirement based on age. It seems that the subject edict arbitrarily treats similarly situated judges differently, in a discriminatory manner without a rational basis to support the disparate treatment; therefore, it appears to run afoul of the equal protection clause of the Constitution.

Justice Morton considered the fact that

the respondents offered no justification for the age distinctions.

> Moreover, no argument is advanced by defendants that the inequality is justified for any economic or social policy reasons. That the exemption of elected officials from the benefits of the statute was intended to preserve the right of a state through its voters, to select its own officers and its own employees without restriction by the Federal judiciary, as suggested by defendants, does not seem to be a valid state interest to justify the classification in question under the circumstances herein.
>
> The difference in treatment seems palpably arbitrary and amounts to an invidious discrimination (see, Lahnshausen v. Lake Shore Auto Parts Co., 410 US 356, 359; Shapiro v. City of New York, 32 NY2d 96, 103; Allied Stores v. Bowers, supra).

With respect to the effect of Maresca v. Cuomo, 64 N.Y.2d 242, 485 N.Y.S.2d 724 (1984); appeal dismissed _____ U.S.

_____, 106 S.Ct. 34 (1987), the lower court said:

> The consitutional analysis in Maresca v. Cuomo (64 NY2d 242), cited and relied upon by defendants, is not relevant to the facts at bar where the issue presented is the constitutional validity of directing mandatory retirement of judges on the narrow basis of whether a judge is elected or appointed; that issue was not before the Court of Appeals in Maresca, supra -- that case turned only on the rationality of involuntary retirement at the age of 70.
>
> Moreover, the legitimate state interest spelled out by the court in Maresca, supra justifying the mandatory retirement of judges in all the courts at the age of 70, except the Supreme Court and Court of Appeals, whose services may be recertified beyond the age of 70, does not find any relevancy to the facts at bar.

On appeal, the Appellate Division in, Diamond v. Cuomo, 130 App. Div.2d, 292, 519 N.Y.S.2d 691 (2d Dep't 1987), concluded that the removal of age maximums in the ADEA "does not affect the continued

vitality of the Maresca court." The court said at infra, 27-a, that there was a rational basis for the distinction between elected judges who reach age 70 and those who were appointed.

> The distinction made in that law is not between appointed judges and elected judges; rather, it is a distinction between all elected State officers generally, as opposed to all non-elected State officers. The Congress may well have considered that, in general, important decisions in the exercise of State powers or in the formulation of State policies are more often made by elected State officers, including those in the legislative or executive as well as in the judicial branches of government, than by appointed officers in each branch. Based on this consideration, the Congress could certainly have determined that established notions of comity between State and Federal governments would be more offended by direct Congressional regulation of elected State or local officials than by similar regulation of appointed State or local officials. It is obvious therefore that the distinction recognized in the Federal age

> discrimination law between those State or local officials who are elected and those who are appointed is rational.

Appellants do not argue in this case that the ADEA exemption between elected and appointed officials is not rationally based; they urge instead, that the State application of the mandatory retirement provisions as interpreted under the provisions of the ADEA violates their equal protection rights.

The dissenting opinion by Justice William Thompson tracked all of appellants' arguments in the court below and reached the conclusion that the mandatory retirement provisions and the Administrative Board's ruling are irrational as applied to appellants.

> I vigorously disagree with this position since the mandatory retirement policy at issue in Maresca is not the issue with which we are faced on this

> appeal. In Maresca, the court determined that there was a rational basis for the mandatory retirement age limitation as it applied to all State judges; in the instant case, we are confronting a State policy which requires that all elected judges retire at the age of 70, while permitting their appointed counterparts to complete their judicial terms well beyond the age of 70. It is this policy, the validity of which the majority apparently believes is not properly before us, that I find to be irrational and lacking a rational basis necessary to withstand equal protection analysis. Nor do I believe that we should avoid passing on this issue on the basis of a hypertechnical analysis of the Federal ADEA as interpreted in the formal opinion of the board which gave voice and substance to a new State policy on age discrimination with respect to the State's judges.

The "narrow distinction" argument made by appellants and adapted by the Supreme Court was affirmed by Justice Thompson:

> In the matter before us, I do not believe that the narrow distinction as to whether a Judge is elected or appointed is

> sufficient to justify the disparity in their treatment. Elected and appointed judges perform the identical job, handle a caseload of equal magnitude, drawing the same salary and compensation, and are held to the same standards of judicial responsibility. In this regard, I find no rational State interest whatsoever in the unequal treatment of members of our State judiciary who function in identical capacities.

On appeal, the Court of Appeals, 70 N.Y.2d, 338, 520 N.Y.S.2d 732 (1987) re-stated the appellants' constitutional arguments:

> It is plaintiffs' contention that in view of the federal statute and the Administrative Board's interpretation of it, the pre-existing provisions of the Constitution and the Judiciary Law deny them their constitutional right to due process and equal protection of the laws. They concede that the federal statute must be applied to state employees under the Supremacy Clause of the United States Constitution (US Const art VI, §12) and they make no attempt to challenge its constitution-ality. They contend, however,

> that their constitutional rights have been abridged because of the operation of the federal statute, as interpreted by the Administrative Board, on the state constitutional and statutory provision.

The Court of Appeals rejected appellants' constitutional claims.

> With respect to their equal protection claim, we hold first that age is not a suspect class and therefore the appropriate standard of review is whether the classifications created are rationally related to some state interest. Applying that standard, we agree with the majority at the Appellate Division that the Administrative Board did not err in applying the federal statute as written, nor does any denial of plaintiffs' rights to equal protection of the laws result from the joint operation of the state and federal statutes and the state constitutional provision.

Notwithstanding the inapplicability of the Maresca decision which dealt solely with the rationality of involuntary retirement at the age of 70, the Court of

Appeals relied solely upon that decision to support its affirmance of the decision of the Appellate Division dismissing the complaint.

> In Maresca we noted various grounds for mandating retirement of Judges at the age of 70 which established the rationality of New York's system for choosing and retiring judges. Those reasons remain valid notwithstanding the effect of the federal statute. That the State policy requiring retirement of Judges is partially frustrated because the federal statute preempts it with respect to appointed Judges does not render the policy irrational and the State is free to pursue that policy to the extent doing so is consistent with federal law. While certain anomalies appear as the result of the unrelated provisions of the federal statute and the State provisions, such anomalies in judicial classifications are not unusual given the diversity of the State and its population, and have been upheld (see, e.g., Cass v. State of New York, 58 NY2d 460). As we noted in Maresca, 'for the repeal of such provisions, appeal lies to the ballot and to the legislative processes of

democratic government, not to the courts' (id., at p 249, citing Noble State Bank v. Haskell, 219 US 575, 580 [Holmes,J.]; United States v. Butler, 297 US 1, 79 [Stone, J. dissenting]).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Prior to the ADEA amendment which removed all age barriers in employment this Court had not ruled upon the question whether mandatory retirement at the age of 70 violated equal protection rights. In Maresca v. Cuomo, supra, this Court dismissed an appeal from a Court of Appeals finding that there was a rational basis for the State's mandatory retirement provisions for judges who reach the age of 70, saying that there was "no substantial federal question." This Court denied certiorari in a similar case, Malmed v. Thornburgh, 621 F.2d 565 (3rd Cir.) cert. den. 449 U.S. 955 (1980).

Here, however, a new and substantially different and weightier question is presented which will, no doubt, surface in other state court proceedings unless this Court determines this case on its merits. The issue which has now arisen finds its genesis in the ADEA amendment which as of January 1, 1987, prohibits all age discrimination, but exempts elected officials from its coverage.

At present there are thirty states which hold elections for judicial office and four states which hold legislative elections[1]; of those, twenty-four states

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[1] Alabama; Arizona; Arkansas; California; Florida; Georgia; Idaho; Illinois; Indiana; Kentucky; Louisiana; Michigan; Minnesota; Mississippi; Missouri; Montana; Nevada; New Mexico; New York; North Carolina; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Washington; West Virginia; Wisconsin; (Connecticut; Rhode Island; South Carolina and Virginia hold legislative elections.)

have mandatory retirement provisions[2]. Clearly, the issue presented in this case will arise in those states unless this Court decides this matter on its merits.

According to the Court of Appeals, the mandatory retirement provisions compel the retirement of elected judges who reach age 70 but not appointed judges because of the ADEA, notwithstanding that virtually all judges in the State perform identical judicial functions as acting Supreme Court Justices during substantially all of their tenures in office.

Because of its profound national

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[2] Alabama; Arizona; Arkansas; California; Connecticut; Georgia; Idaho; Illinois; Indiana; Louisiana; Michigan; Minnesota; Missouri; Montana; New York; North Carolina; Ohio; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Texas; Washington

affect, this Court should now address appellants' contention that it would be a perversion of the congressional intent and a violation of the spirit of the Equal Employment Opportunity Act of 1972 which excluded public officials from the definition of "employee," to interpret such Act as a vehicle to deprive voters of their elective franchise and deny judges over age 70 a right to continue in office until the end of their elected term; and, that there can be no rational basis for distinguishing between judges over the age of 70 who are elected and those who are appointed?

Perhaps the more critical question thirsting for an answer is whether the nation deserves this Court's judgment respecting age and employment. Specifically, does the amendment to the

ADEA which omits all age discrimination in employment, express a national intention that age is now a "suspect" class or a "quasi-suspect" class and that this Court should now reconsider prior decisions and require states to justify age related discriminatory legislation on the basis of "strict scrutiny"?

POINT I

THERE IS NO RATIONAL BASIS FOR A MANDATORY RETIREMENT PROVISION FOR JUDGES BASED UPON WHETHER THEY ARE ELECTED OR APPOINTED

Mandatory retirement survived constitutional attack in Maresca v. Cuomo, supra, where the court found that age was not a suspect class, and that there was a rational basis for distinguishing between judges over age 70 and under age 70. This Court denied the appeal in _____ U.S. _____, 106 S.Ct. 34 (1987).

The Court of Appeals below has relied totally upon its Maresca decision to sustain constitutionality against equal protection challenge despite the extreme change in circumstances since Maresca.

Appellants contend that Maresca has no application to this proceeding and that this Court is not now confronted with a very narrow and extremely novel constitutional issue, national in proportions, because of the affect that the amended ADEA has upon elected judges under state mandatory retirement provisions upon elected judges, viz., the only current ground for differing classes of judges for mandatory retirement purposes is whether a judge is elected or appointed.

ADEA Legislative History

In a twist of logic, the Court of Appeals excluded elected judges from the

ADEA because of the "elected" exemption, totally ignoring the legislative intent behind the exemption.

The definition of "employee" in the ADEA was discussed in 1972 by Senator Sam Ervin who feared that granting the Equal Employment Opportunity Commission jurisdiction over state elected officials could dangerously result in an unconstitutional interference with state sovereignty.

Senator Erin stated:

> In other words, this would give the Federal Courts jurisdiction to inquire as to what motive a Governor had in selecting men for his cabinet who would give him advice on his constitutional and legal duties, or if a Governor was actuated in any extent in the selection of an adviser or if the people were actuated in any extent in the election of a public official, so that the Commission could come in an remove that public official from office or that adviser from office and dictate who should be employed in his place.

> Mr. President, it is absurd for a Federal agency to be able to say to a State who its Governor, state officials, or advisers shall be. I respectfully suggest that if Congress is not going to make itself ridiculous this amendment should be agreed to.

118 Cong. Rec. 4096.

It is obvious from the above that the purpose of the amendment was to prevent federal interference with state and local government and was not to be used as is it is here, to allow discrimination against elected officials on the basis of age. The mandatory retirement provisions in question are no more valid than if they prohibited candidates from elective judicial office on the basis of race.

Senator Erin was clearly concerned with state sovereignty; the source of his fear was this Court's contemporaneous decisions

on the Voting Rights Act of 1965 (See 118 Cong. Rec. 4483-92). The Senator stated:

> In my mind it is a monstrous proposal that Federal judges should have to lay aside their judicial knitting in order to embark upon a course of action which is essentially supervising who shall be the officers and the employees of a State or of the political subdivision of a State.
>
> I would not have been concerned so much about the question raised by this amendment had it not been for some recent decisions of the Supreme Court of the United States.
>
> Now, when the Federal Government deprives any people or any group of people of the right to elect their own officials and select their own employees, it is clearly depriving them of liberty within the purview of the due process clause.

Id. at 4483.

The statements of Senator Harrison Williams of New Jersey, the sponsor and main force behind the bill, showed that the amendment was aimed at allowing state

voters the right to choose their elected officials:

> But let me back up here to say that I certainly subscribe, and for many reasons, to the exclusion of the elected official at the State and local governing level. His test comes at the polls rather than under a law of this nature. I think that it is certainly sufficient test as to propriety in the undertaking of his office, in view of the people that have the opportunity to select him for elected office. For another reason I would think he should not be in a position to have unwarranted and irresponsible charges made against him. Again, his test would be at the polls.

Id. at 4492.

Further, the statements of Senator Williams in his Section-by-Section analysis of H.R. 1746, id. p. 7166, showed that the amendment was a narrow one aimed at preventing the federal bureaucracy from denying state voters their choice, by excepting from the definition of employee:

> . . .those persons elected to public office in any State or political subdivision. The exemption extends to persons chosen by such officials to be on their personal staffs, appointees of such officials to be on their personal staffs, appointees of such officials on the highest policy making levels such as cabinet members or other immediate advisors of such elected officials with respect to the exercise of the constitutional or legal powers of the office held by such elected officer. The exemption does not include civil service employees. This exemption is intended to be construed very narrowly and is in no way intended to establish an overall narrowing of the expanded coverage of State and local governmental employees as set forth in §701(a) and §701(b) above.

Id. at 7167.

It is obvious that the "very narrow" construction intended by the Congress does not invite the states to pass or to continue discriminatory measures which work to deprive judges of their right to equal protection. The exemption from coverage was meant to prevent federal agencies from

interfering in the elective process of a state and to exclude elected officials from coverage in order to relieve the states from its political burdens.

The exception had nothing to do with age and was created solely for the benefit of the voters and states' rights. Thus, age discrimination otherwise irrational is not valid where practiced against elected office holders. It is true that the ADEA does not preempt the states from governing its judiciary; thus, appellants do not seek a determination that the ADEA amendment overrides the State's mandatory retirement provisions. Appellants seek a merely common sense finding that unless age can be shown to be a rational factor, it should be ignored as a consideration in employment.

The foregoing legislative history reveals that the Congress, acting as the

national conscience, recognizes that age should not be a barrier to employment whether the position is attained through election, appointment, or placement and that elected officials are exempted from protection only because of political expediency.

Based upon the foregoing, the reasoning, in Maresca and Malmed v. Thornburgh, 478 F.Supp. 998 (E.D. Pa. 1979), rev'd, 621 F.2d 565 (3d Cir.), cert. denied, 449 U.S. 955 (1980), which sustained the age distinction between judges, cannot serve to validate the distinction between elected and appointed judges.

There is simply no rational basis for the difference in treatment between elected and appointed judges.

Under "rational basis" analysis, class differences will be upheld if it is found that there is a rational relationship to a permissible State interest.

It is just as clear that even under a "rational basis" standard, disparate treatment of those similarly situated will not be tolerated without justification, see e.g. Johnson v. Smith, 696 F.2d 929 (1983), Flowers v. Webb, 575 F.Supp. 1450 (E.D.N.Y. 1983) and the classification, according to this Court in Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561 (1920):

> . . . must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

It is clearly irrational to apply the mandatory retirement provisions in a manner

which would allow a New York Supreme Court Justice to be elected to a fourteen-year term at age 65, only to be dismissed at age 70, while a lower court judge, such as a New York City Criminal Court judge or Family Court judge may be appointed to office at age 65 and serve until age 75.

The irrationality of the application of the ADEA upon mandatory retirement provisions is evidenced by the disparity in treatment of Family Court judges in New York State. Outside of the City of New York, Family Court judges are elected; inside of the bordering City such judges are appointed. Thus, judges are forced to retire because of an accident of geography.

This Court should disregard the prior state decisional law regarding mandatory retirement of judges and re-examine its

dismissals of the appeals from those decisions.

It is no justification that the ADEA was foisted upon the state under the pre-emption doctrine thereby creating a disparity in treatment no longer based upon age, which is the basis for mandatory age retirement provisions, but, upon the narrow ground that one class of judges is elected, the other appointed.

It is no solace to elected judges that the uneven-handed treatment was created by federal law. The bottom line is that no matter how arrived at there is no rational basis for the disparate treatment of 70 year-old judges although there may have been a rational basis for the <u>age</u> distinctions prior to the ADEA amendment.

POINT II

AGE SHOULD BE A SUSPECT OR QUASI-SUSPECT CLASS

There is a far more compelling reason why this Court should hear this appeal. The decision of Congress to eliminate all age discrimination in employment signals the way for a review of the question whether age should be a "suspect" class which, of course, would elevate the test of constitutionality to "strict scrutiny," which the mandatory retirement provisions cannot survive. Surely, this Court must respond to the national statement that age should have no piece of the employment process and a mandatory retirement provision disregards that statement and should be reviewed with a suspicious eye. There is an additional--subsidiary--issue which descends; whether age should be a "quasi-suspect" class.

Appellants herein deserve consideration as a "quasi-suspect" class. While the elderly have been held not to be a "suspect class," see Trafelet v. Thompson, 594 F.2d 623, cert. den., 444 U.S. 906, 100 S.Ct. 219 (7th Cir. 1979), statutes involving the elderly should be given greater scrutiny than the mere rationality standard. Such "quasi-suspect" class status has been extended to aliens. See, Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2282 reh. den., 458 U.S. 1131, 103 S.Ct. 14 (alienage not suspect) Burnall v. Fainter, 467 U.S. 216, 104 S.Ct. 2312 (1984) (statutes involving aliens must nonetheless be viewed with strict scrutiny).

In the area of classifications involving women, this Court has imposed a standard somewhere between the two standards articulated above, by requiring

that legislation which classifies according to sex be substantially related to an important state interest. See e.g. Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254 (1971).

Appellants and those similarly situated possess the qualities attributable to a suspect class. This Court, denying "suspect class" status, defined the qualities of such a class in San Antonio School District v. Rodriquez, 411 U.S. 1, 29, 93 S.Ct. 1278, 1294, reh. den., 411 U.S. 959 (1973):

> . . . traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process.

It is evidence of the fact that the elderly deserve a higher standard to

justify a classification based on age, that Congress deemed it necessary to pass and then amend the ADEA to protect their rights by eliminating all age distinctions. Obviously, appellants are members of a class whose immutable characteristics mandate the application of a standard more demanding than mere rationality. Therefore, strict scrutiny should be applied here since the State action in question implicates a "suspect" or "quasi-suspect" class.

In the instant case, the mandatory retirement provisions fail to express a legislative purpose rationally related to the mandatory retirement age. If one assumes, however, that the purpose is to keep physically or mentally incapable judges off the bench, then the statutes are faulty because now they have been construed

by the State to irrationally distinguish between elective and appointive judicial offices; not between capable or imputedly incapable judges.

The history of mandatory retirement provisions for judges based upon age illustrates that the state cannot meet a strict scrutiny test, irrespective of the amendment to the ADEA which has now, unintentionally, made mandatory retirement contingent upon whether a judge is elected or appointed.

> A longstanding consensus in the medical community holds that age, even old age, is not to be trusted as a definitive statement of job ability. In 1974 an AMA committee announced: 'Chronological age has been observed to have no magic in terms of judgment, ability, and physical dexterity. Individuals may lose these qualities at age forty or retain them past eighty and [therefore retirement] should be based on the individual's competence and ability, not age'.... Because of the poor 'fit' between age and job ability,

> setting a presumptive age will carry an over-inclusive impact on individuals.

Note, Age Discrimination in Retirement, 8 Am. J. L. & Med. 443, 447 (1984) (quoting American Medical Association, Committee on Aging, 230 J.A.M.A. 1312 (1974).

In Malmed v. Thornburgh, 478 F.Supp. 998 (E.D.Pa. 1979), rev'd, 621 F.2d 565 (3d Cir.), cert. denied, 449 U.S. 955 (1980), the District Court examined a provision of the Pennsylvania State Constitution which required judges of the Court of Common Pleas to retire at age 70. The principal justification advanced by the State in defense of the rule was "the removal of unfit judges from the bench by means of mandatory retirement at age seventy." 478 F.Supp. at 1008. Now, however, the removal of "unfit judges from the bench" is no longer the object of mandatory retirement.

The history of the mandatory retirement provisions illustrates the total lack of rationality to its creation; now, the relationship of the mandatory retirement provision to age is completely remote.

The mandatory retirement age of 70 years for judges was added to the New York State Constitution for the first time as Section 13 of the Judiciary Article of 1869. At the Constitutional Convention of 1894, several delegates argued that "the age of seventy years is too early a period to lose the services of a lawyer who has been educated upon the bench and has become a competent judge." Revised Record of the Constitutional of 1894, Vol. II at 1153 (1900). When called upon to justify the 70-year old age limit, the Chairman of the Judiciary Committee replied, in full, as follows:

> Mr. Chairman, according to Holy Writ, it is the natural right of man to consider that he has lived his allotted length of days when he reaches the age of seventy. That great principle has been recognized in the judicial system of the United States. We found it in the Constitution of this State, and we have left it as it was.

Id. at 1153 (remarks to Mr. Root).

Nevertheless, a proposed amendment to raise the retirement age to 75 was defeated by a vote of 63 to 44, id. at 1157, and the mandatory retirement age for judges was continued at age 70 under Art. VI, §12 of the Constitution of 1894.

The Constitutional Convention of 1938 again considered raising the mandatory retirement age to 75. Revised Record, New York Constitutional Convention 1938, Vol. III at 1978-82. The Chairman of the Judiciary Committee opposed the amendment and stated: "Now, the age of 70 for retirement has been long on the statute

books, and it corresponds with the Scriptural threescore years and ten." Id. at 1978 (remarks of Mr. Sears); see also Journals and Documents, New York State Constitutional Convention 1938, Document No. 8 at 4 (Report of the Committee on the Judiciary). The proposed amendment was defeated, III Revised Record, supra, at 1982, and retirement of judges at age 70 was incorporated in Art. VI, §§ 20 and 21.

The judiciary article of the Constitution was repealed in 1961 and a new judiciary article adopted in its stead. The changes in the new article dealt mainly with the area of the reorganization and partial unification of the court system. The 70-year old mandatory retirement provision was re-adopted, with no substantive changes and with little or no debate, as Art. VI, §25(b).

It is possible to imagine that the mandatory retirement provision may have had some validity when it was first enacted in 1869.

In Massachusetts, the first state to collect vital statistics systematically, life expectancy in 1850 was only 38.3 for males and 40.5 years for females. W. Peterson Population 579 (3d ed. 1975.) For persons born in 1900, the average life expectancy in the United States was 47.3 years. United States Department of Health and Human Services, Vital Statistics of the United States 1979, Vol. II, Part A, Table 6-5. For those born in 1982, the average life expectancy was 74.6 years, and the remaining life expectancy of a 70 year old individual in 1982 was 13.7 years. United States Department of Health and Human Services, Vital Statistics of the United

States 1982, Vol. II, Section 6, Table 6-3. In other words, the average life expectancy has increased by more than 25 years (or more than 50 percent) with no corresponding increase in the mandatory retirement age.

In Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2652 (1976), and Vance v. Bradley, 440 U.S. 93, 99 S.Ct. 939 (1979), this Court upheld mandatory retirement provisions against equal protection challenges. The teaching of those cases is not that mandatory retirement provisions will always pass constitutional muster; it is simply that under the facts and circumstances of those particular cases, the standard of judicial review was "rationality" and the statutes at issue were rationally related to furthering a legitimate state interest. This Court is asked to consider that the

ADEA amendment and the consequent interpretation and application of the mandatory retirement provisions by the State has removed all rationality from such provisions as applied to judges throughout the United States who may be in the same position as appellants.

Murgia concerned a Massachusetts statute requiring retirement of state police officers at age 50. However, this Court held that because public employment is not a fundamental right and that age are not a suspect class, the statute should be examined under the rational basis standard. Murgia, 427 U.S. at 312-14. This Court found that "[The] nature of the duties to be performed [by state police officers] in all weathers is arduous in the extreme," Id. 427 U.S. at 314 n.7, and that the mandatory retirement statute rationally

furthers the legitimate state interest of "seek[ing] to protect the public by assuring physical preparedness of its uniformed police." Id. 427 U.S. at 314.

Vance v. Bradley, supra, involved the mandatory retirement of foreign service officers at age 60. This Court found that "the Foreign Service involves extended overseas duty under difficult and often hazardous conditions" leading to "wear and tear on members of this corp." Id. at 440 U.S. at 103. The mandatory retirement statute was held to be rationally based because it "minimizes the risk of less than superior performance by reason of poor health or loss of vitality." Id. 440 U.S. at 103.

It will be argued before this Court that the case at bar should be examined under a standard of strict judicial

scrutiny rather than mere rationality because age should now be a "suspect" or "quasi-suspect" class.

Trafelet v. Thompson, 594 F.2d 623 (7th Cir.), cert. den., 444 U.S. 906, 100 S.Ct. 219 (1979), involved an equal protection challenge to the mandatory retirement of elected state court judges. The Circuit Court applied a rational basis test and upheld the mandatory retirement statute. This Court denied certiorari, which does not imply approval of the decision and has no significance. Moreover, Justice White in his dissent said that the mandatory retirement of elected judges can be "justified only by a compelling state interest" under a strict scrutiny test. Trafelet v. Thompson, 444 U.S. 906 (1979).

The mandatory retirement provisions at issue herein do not meet even the minimum

test of rationality. Unlike the positions at issue in Murgia and Bradley, which concerned the impact of age upon a job, the only criteria for the forced retirement of a judge at the age of 70 is whether he is elected or appointed.

The only reason cited by the drafters of the mandatory retirement provisions herein was the biblical dogma of "three score years and ten." That certainly cannot be considered a rational basis for upholding the statute today nor are the reasons advanced by the Court of Appeals in Maresca.

CONCLUSION

Appellants submit that this appeal brings before this Court substantial constitutional questions which require plenary consideration, with briefs on the

merits and oral argument for their resolution.

Respectfully submitted,

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Dated: Queens, New York
February 12, 1988

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

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2 No. 303
Ralph Diamond, et al.,
Appellants-Respondents,
v.
Mario Cuomo, Governor of the State of New York, et al.,
Respondents,
Westchester County Board of Elections,
Respondent-Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(303)Joseph O. Giaimo, Forest Hills, for appellants.
Robert Abrams,Attorney General (Lawrence S. Kahn, O.Peter Sherwood,& Arnold D. Fleischer of counsel) for respondents Cuomo,Regan et al.
John Eiseman, Michael Colodner, & Ann T. Pfau NY City, or respondent OCA.
Henry J. Logan,Westchester County Attorney (Frank Marocco & Kenneth E. Powell of counsel) for respondent Westchester Bd. of Elections.

Per Curiam:

This action, instituted by various State Judges, seeks a declaration that Article VI, §25(b) of the State

Constitution and section 23 of the Judiciary Law, which require retirement of Judges and Justices of the Unified Court System at age 70, are unconstitutional as applied to them. We rejected similar claims in 1984 declaring the challenged provisions constitutional in Maresca v Cuomo (64 NY2D 242; appeal dismissed ___ US __, 106 S Ct 34). Since then, however, Congress has amended the Age Discrimination in Employment Act (29 USC §623) to prohibit discrimination in employment based on age, against persons age 70 and above. In interpreting that statute, as it applies to State judicial officers, the Administrative Board determined that the statutory protection required that appointed Judges be allowed to continue to the end of their appointive terms, notwithstanding their age, but that elected Judges must retire at age 70 because the federal statute, by its

terms, did not apply to elected state officers (29 USC §630[f]).

It is plaintiffs' contention that in view of the federal statute and the Administrative Board's interpretation of it, the pre-existing provisions of the Constitution and the Judiciary Law deny them their constitutional right to due process and equal protection of the laws. They concede that the federal statute must be applied to state employees under the Supremacy Clause of the United States Constitution (US Const art VI, cl 2) and they make no attempt to challenge its constitutionality. They contend, however, that their constitutional rights have been abridged because of the operation of the federal statute, as interpreted by the Administrative Board, on the state constitutional and statutory provisions.

We answered plaintiffs' due process concerns in Maresca v Cuomo (supra) and see no occasion to reconsider those matters here.

With respect to their equal protection claim, we hold first that age is not a suspect class and therefore the appropriate standard of review is whether the classifications created are rationally related to some State interest. Applying that standard, we agree with the majority at the Appellate Division that the Administrative Board did not err in applying the federal statute as written, nor does any denial of plaintiffs' rights to equal protection of the laws result from the joint operation of the state and federal statutes and the state constitutional provision.

In Maresca we noted various grounds for mandating retirement of Judges at the age

of 70 which established the rationality of New York's system for choosing and retiring judges. Those reasons remain valid notwithstanding the effect of the federal statute. That the State policy requiring retirement of Judges is partially frustrated because the federal statute preempts it with respect to appointed Judges does not render the policy irrational and the State is free to pursue that policy to the extent doing so is consistent with federal law. While certain anomalies appear as the result of the unrelated provisions of the federal statute and the State provisions, such anomalies in judicial classifications are not unusual given the diversity of the State and its population, and have been upheld (see, e.g., Cass v State of New York, 58 NY2d 460). As we noted in Maresca, "for the repeal of such provisions, appeal lies to

the ballot and to the legislative processes of democratic government, not to the courts" (id., at p 249, citing Noble State Bank v Haskell, 219 US 575, 580 [Holmes, J.]; United States v Butler, 297 US 1, 79 [Stone, J. dissenting]).

One of the plaintiffs is a certificated Supreme Court Justice. The Administrative Board determined that such Justices hold office by reason of their election to the Supreme Court, that they are exempt from the provisions of the federal statute, and that their tenure is limited by Judiciary Law §115. We find no error with that interpretation and no merit to the claim that such justices' constitutional rights have been abridged because they have been held elected, not appointed, officers who are exempt from the provisions of the federal statute.

Accordingly, the order of the Appellate Division should be affirmed and the cross appeal of the Westchester County Board of Elections should be dismissed as academic, all without costs.

* *

Order affirmed, without costs. Cross appeal dismissed as academic, without costs. Opinion Per Curiam. Judges Simons, Kaye, Alexander, Titone and Hancock concur. Chief Judge Wachtler and Judge Bellacosa took no part.

Decided October 15, 1987

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND DEPARTMENT

2584P
Z/eb

___ AD2d ___ Argued - September 23, 1987

WILLIAM C. THOMPSON, J.P.
LAWRENCE J. BRACKEN
RICHARD A. BROWN
CHARLES B. LAWRENCE
ARTHUR D. SPATT, JJ.

3738E

Ralph Diamond, et al., plaintiffs-respondents, v Mario Cuomo, et al., appellants, et al, respondents.

ORDER

Robert Abrams, Attorney-General, New York, N.Y. (Lawrence S. Kahn and Arnold D. Fleishner of counsel), for appellants Cuomo, Regan, the New York State Employees' Retirement System, and the Policemen's and Firemen's Retirement System.

Henry J. LOGAN, County Attorney, White Plains, N.Y. (Kenneth E. Powell and Frank Marocco of counsel), for appellant Westchester County Board of Elections.

Giaimo, Vreeburg & Rosen, Forest Hills, N.Y. (Joseph O. Giaimo of counsel), for plaintiffs-respondents.

Michael Colodner, New York, N.Y. (John Eiseman and Ann T. Pfau of counsel), for respondents Albert M. Rosenblatt, Chief Administrative Judge of the Unified Court System, and the New York State Office of Court Administration.

Appeals (1) by Mario Cuomo, Edward V. Regan, the New York State Employees' Retirement System, and the Policemen's and Firemen's Retirement System, from so much of an order and judgment (one paper) of the Supreme Court, Kings County (Morton, J.), dated September 14, 1987, and entered in Kings County, as declared that NY Constitution article VI, §25(b) and Judiciary Law §23, as applied to the plaintiffs, violate their rights under the US Constitution to due process of law and equal protection of the laws and denied the cross motion of those appellants for a declaration in their favor and to otherwise dismiss the complaint, and (2) by the Westchester County Board of Elections, as limited by its brief, from so much of that order and judgment as failed to specify how it should proceed with the election of judges of the Family Court, Westchester County.

ORDERED that the order and judgment is reversed insofar as appealed from by the appellants Cuomo, Regan, the New York State Employees' Retirement System and the Policemen's and Firemen's Retirement System, on the law, without costs or disbursements, and the cross motion of those appellants to dismiss the complaint is granted to the extent that and it is declared that NY Constitution article VI,

§25(b) and Judiciary Law §23, do not violate the plaintiffs' rights under the US Constitution to due process of law and equal protection of the laws; and it is further.

ORDERED that the appeal by the Westchester County Board of Elections is dismissed as academic, without costs or disbursements, in light of our determination on the appeal by the appellants Cuomo, Regan, the New York State Employees' Retirement System and the Policemen's and Firemen's Retirement System.

OPINION PER CURIUM.

BRACKEN, BROWN, LAWRENCE and SPATT, JJ., concur.

THOMPSON, J.P., concurs insofar as it is declared that NY Constitution, article VI, §25(b) and Judiciary Law §23 do not violate the plaintiffs' rights under the US Constitution to due process of law and equal protection of the laws, but otherwise dissents and votes to affirm the denial of the cross motion, and to modify the order and judgment appealed from by declaring that the Federal Age Discrimination in Employment Act (29 USC §621, et seq.), as interpreted by the New York State Administrative Board of the Courts, violates the plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the US Constitution, and enjoining the State from compelling the plaintiffs' involuntary retirement by

reason of age pursuant to the State's mandatory retirement provisions.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

October 1, 1987 DIAMOND v CUOMO 3738E

2584P
Z/eb
October 1, 1987

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

THOMPSON, J.P., BRACKEN, BROWN, LAWRENCE and SPATT, JJ.

RALPH DIAMOND, et al.,

Respondents,

-against-

MARIO CUOMO, et al.,

Appellants, et al.,
Respondents,

APPEALS (1) by Mario Cuomo, Edward V. Regan, the New York State Employees' Retirement System, and the Policemen's and Firemen's Retirement System, from so much of an order and judgment (one paper) of the Supreme Court (Franklin W. Morton, Jr., J.), dated September 14, 1987, and entered

in Kings County, as declared that NY Constitution article VI, §25(b) and Judiciary Law §23, as applied to the plaintiffs, violate their rights under the US Constitution to due process of law and equal protection of the laws, and denied the cross motion of those appellants for a declaration in their favor and to otherwise dismiss the complaint, and (2) by the Westchester County Board of Elections, as limited by its brief, from so much of that order and judgment as failed to specify how it should proceed with the election of judges of the Family Court, Westchester County.

Robert Abrams, Attorney-General, New York, N.Y. (Lawrence S. Kahn and Arnold D. Fleishner of counsel), for appellants Cuomo, Regan, the New York State Employees' Retirement System, and Policemen's and the Firemen's Retirement System.

Henry J. Logan, County Attorney, White Plains, N.Y. (Kenneth E.

Powell and Frank Marocco of counsel), for appellant Westchester County Board of Elections.

Giaimo, Vreeburg & Rosen, Forest Hills, N.Y. (Joseph O. Giaimo of counsel), for Plaintiffs-respondents.

Michael Colodner, New York, N.Y. (John Eiseman and Ann T. Pfau of counsel), for respondents Albert M. Rosenblatt, Chief Administrative Judge of the Unified Court System, and the New York State Office of Court Administration.

PER CURIAM. NY Constitution article VI, §25(b), provides for the mandatory retirement of certain members of the judiciary at the age of 70. This provision has already withstood a constitutional challenge premised upon the argument that such discrimination against Judges over 70, on the basis of their age, lacks a rational basis and thus offends the Equal Protection Clause of the Fourteenth Amendment of the US Constitution (US Const 14th Amend; see,

Maresca v Cuomo, 64 NY2d 242, appeal dismissed ____ US ____, 106 S Ct 34). In the Maresca case, the Court of Appeals identified several logical reasons for this age-based limitation. Nothing has occurred during the few years since Maresca was decided which would, in any way, tend to detract from the cogency of those reasons or otherwise call into question the analysis or the result reached in that case. Nevertheless, the plaintiffs-respondents now strenuously [sic] argue that Maresca "no longer applies", because, effective January 1, 1987, certain Federal legislation, addressed to a nationwide concern with age discrimination in employment practices, was amended to, according to an interpretation by New

York's Administrative Board of the Courts,[1] in effect, remove from the scope of New York's mandatory retirement rule those judges who are appointed rather than elected to office (see, Pub L 99-592, §[2][c] which expanded the scope of the Age Discrimination in Employment Act of 1967 to cover employees over 70 years of age; see also, 29 USC §630[f] which exempts from the scope of that law all elected, but not all appointed State officials). We conclude that this circumstance does not affect the continued vitality of the holding of the Maresca court that New York's traditional policy of requiring certain judges to retire at the age of 70 is fully consistent with constitutional principles of equal

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[1]The Administrative Board of the Courts consists of the Chief Judge of the State of New York and the Presiding Justices of the Appellate Divisions of the Supreme Court (see, Judiciary Law §210[2]).

protection. We view as unfounded any argument that New York must entirely set aside its historical rule requiring certain judges to retire at 70 solely because, under the purported command of Federal legislation, a relatively small percentage of such judges (approximately 18%) have been exempted from the scope of that rule. We therefore are of the opinion that the plaintiffs' renewed constitutional attack on the mandatory retirement provisions of NY Constitution, article VI, §25(b) is without substance.[2]

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[2]That the members of this court may be affected by the outcome of this appeal does not call for recusal. This case involves not only the constitutionality of a statute, but also an interpretation of the NY Constitution, and thus no direct appeal lies to the Court of Appeals (see, CPLR 5601[b]). Since this tribunal has exclusive jurisdiction at this stage of the proceedings to review the questions involved herein, under the rule of necessity (see, Matter of Morgenthau v Cooke, 56 NY2d 24, 29, n 3; Maresca v Cuomo, 64 NY2d 242, 247, n 1), we are

I

Each of the five plaintiffs in this action is an elected Judge. The plaintiff Benjamin F. Nolan, a Judge of the Civil Court of the City of New York, Bronx County, and Barbara Kaiser, a Judge of the Family Court, Westchester County, both reached 70 years of age this year and thus will be compelled to retire on December 31, 1987, by virtue of the provisions challenged herein, although in each case their elected terms would not otherwise expire until December 31, 1992. The plaintiff Benjamin Glass, a Judge of the Supreme Court, Queens County, is 76 years old, and has been certificated three times for continued service beyond aged 70 pursuant to Judiciary Law §115. He, too, must retire on December 31, 1987, when his

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required to hear this appeal.

current, and final, two-year certification expires. The remaining two named plaintiffs, Samuel Greenstein of the Civil Court of the City of New York, Kings County, and Ralph Diamond of the Family Court, Nassau County, are age 65 and 68, respectively. Judge Greenstein's term of office expires on December 31, 1989, at which point he will be 67 years of age, and, absent mandatory retirement provisions, he would be eligible to run for re-election for a term of 10 years commencing January 1, 1990, expiring on December 31, 1999. Judge Diamond's term, absent mandatory retirement would expire on December 31, 1995. Judge Diamond was appointed Supervising Judge of the Family Court, Nassau County, and continues to serve in that capacity.

On July 16, 1987, the plaintiffs commenced this action seeking, inter alia,

(1) a declaratory judgment that NY Constitution article VI, §25(b), Judiciary Law §23, and the opinion and finding of the Administrative Board of the Courts that elected judges must involuntarily retire from office upon reaching age 70, are violative of the plaintiffs' due process and equal protection rights under the US Constitution, and (2) a permanent injunction enjoining the defendants from causing their involuntary retirement by reason of age. On July 23, 1987, the defendants Mario Cuomo, Edward V. Regan, the New York State Employees' Retirement System and the Policemen's and Firemen's Retirement System (hereinafter the State defendants) cross-moved to dismiss the complaint and for a declaration that the challenged provisions are constitutional. The defendant New York State Office of Court Administration appeared and indicated

that it would not participate in the action but noted on the record that it objected to the granting of a preliminary injunction against it. The defendant Westchester County Board of Elections took no position with respect to the merits of the complaint, and stood ready to comply with any order of the court. It appeals from so much of the order and judgment as failed to specify how it should proceed with the election of judges of the Family Court, Westchester.

In a memorandum decision dated September 3, 1987, the Supreme Court, Kings County (Morton, J.), held, inter alia, that the challenged provisions had no rational basis and were violative of the plaintiffs' constitutional rights. By order and judgment dated September 14, 1987, Justice Morton granted the plaintiffs' request for declaratory relief and denied the State

defendants' cross motion to dismiss the complaint.[3] The instant appeal ensued.[4]

II

Initially, we note the obvious discrepancy which exists between the nature of the arguments advanced by the plaintiffs in this case and the nature of the relief which they actually seek. The plaintiffs seek a judicial declaration that NY Constitution article VI, §25(b), as well as Judiciary Law §23 are unconstitutional as applied to them. In support of this claim,

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[3]The parties have stipulated before this court that they consented to the entry of a final judgment by the Supreme Court, Kings County, even though the motion pending before it at the time was merely one for a preliminary injunction.

[4]No appeal has been taken by the plaintiffs; hence, we do not review whether the Supreme Court, Kings County, properly denied their motion for certification of a class action. In any event, the plaintiffs have indicated at oral argument that they accept the determination of the Supreme Court in this regard.

the plaintiffs argue that an invidious discrimination has been created between appointed judges over the age of 70, and elected judges over the age of 70, the effect of which is to require members of the latter class to retire prematurely while members of the former class may remain on the bench regardless of age. The fundamental flaw in this argument, however, is rooted in the simple fact that the State constitutional and statutory provisions which the [sic] plaintffs would have us strike down contain no such distinction. The only relevant statute which does draw any distinction on the criterion of whether a particular State official holds his office by election or by appointment, is 29 USC §630(f). This statute, however, is not challenged by the plaintiffs, and so is beyond the scope of our review. Analytical clarity nonetheless will best be

served by addressing, at the outset, whether the legal distinction contained in that statute between elected State officers and appointed State officers comports with established principles of equal protection of the laws. We are of the opinion that it does.

The Federal Age Discrimination in Employment Act of 1967 (Pub L 90-202, §2; 81 Stat 602; 29 USC §621, et. seq.) has as its principal purpose the prevention of "arbitrary age discrimination in employment" (29 USC §621[b]). Under the terms of 29 USC §623(a)(1), it is made illegal for an employer to "discriminate against any individual * * * because of such individual's age". The definition of the term "employee" found in 29 USC §630(f) is broad enough to include many State employees. In the context of this appeal, we need not decide whether this exercise of

power by the Federal government over the states so as to limit their ability to define the qualifications of their own employees is itself unconstitutional (see generally, Equal Employment Opportunity Commn. v Wyoming, 460 US 226). We observe, however, that it may well have been as part of an effort to avoid such constitutional problems that the drafters of the Federal age discrimination law chose to exempt certain elected state officials from its scope.

29 USC §630(f) defines the term "employee" as follows:

> "(f) The term 'employee' means an individual employed by and employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with

> respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country" (emphasis supplied).

On this appeal, we need not and do not decide whether this provision exempts from the scope of Federal law only elected judges, and not appointed judges. This is so, because the Administrative Board of the Courts, based on its construction of this provision, has determined that only elected judges are exempted, and no party to this action urges us to adopt a different construction.

The classification of State and local officers into elective and nonelective categories which is entailed in 29 USC

§630(f), is founded upon a reasonable basis. The distinction made in that law is not between appointed judges and elected judges; rather, it is a distinction between all elected State officers generally, as opposed to all nonelected State officers. The Congress may well have considered that, in general, important decisions in the exercise of State powers or in the formulation of State policies are more often made by elected State officers, including those in the legislative or executive as well as in the judicial branches of government, than by appointed officers in each branch. Based on this consideration, the Congress could certainly have determined that established notions of comity between the State and Federal governments would be more offended by direct Congressional regulation of elected State or local officials than by similar

regulation of appointed State or local officials. It is obvious therefore that the distinctions recognized in the Federal age discrimination law between those State or local officials who are elected and those who are appointed is rational.

It may well be that this distinction in the Federal age discrimination law between elected State or local officers and appointed State or local officers is particularly ill-suited to a particular class of officer, i.e. judges. It may well be that in several states the nature of a particular judicial office as elective or appointive bears little or no relation to the importance of that office. In New York, for example, members of our highest court are appointed by the Governor (see, NY Const. art VI, §2[e]), so that the general premise that the more important State offices tend to be filled by election

rather than appointment is not borne out in this one particular application. However, we do not think that a reasonable criterion which is used to make valid legal distinctions should be considered irrational solely because in one particular application it may fail to accomplish the purpose which, when applied generally, the criterion in fact achieves. More to the point, the rational basis for distinguishing elected from appointed officials should not be considered irrational solely because, as applied to certain (but not necessarily all) judges in New York State, that criterion may fail to accomplish the result it was designed to achieve, i.e., the protection of more important State offices from Federal regulation.

> "(It is of no constitutional significance that the degree of rationality is not as great with

> respect to certain ill-defined subparts of the classification [e.g. some elected New York judges] as it is with respect to the classification as a whole [e.g. all state or local officials nationwide]" (New York City Transit Authority v Beazsr, 440 US 568, 593, citing Matthews v Diaz, 426 US 67, 83-84).

The Congress's attempt to exempt from Federal age discrimination regulation various more important State and local offices, by defining an exempt class consisting of all elective, rather than appointive State or local offices, does not, and cannot, achieve perfect results. As is well illustrated in the context of this State's judicial system, certain elective offices may, in general, be less important than certain appointive ones. However, this does not render the classification arbitrary. The line drawn by the Congress may be imperfect without being unconstitutional (see, Vance v.

Bradley, 440 US 93, 108; Phillips Chemical Co. V Lumas School District, 361 US 376, 385; San Antonio Independent School District v Rodriquez, 411 US 1, 51). A legislative classification "does not offend the Constitution simply because the classification 'is not made with mathematical nicety'" (Dandridge v Williams, 397 US 471, 485, quoting from Lindsley v Natural Carbonic Gas Co., 220 US 61, 78). In short, the distinction made in 29 USC §630(f), between those State or local officers who are elected and those who are appointed is indubitably a rational one.

III

Accordingly, we reject the plaintiffs' argument that the distinction made in 29 USC §630(f), between elected State or local officials and appointed State or local officials is, as applied to them,

unconstitutional. It is appropriate, at this point, to revert to our earlier observation that this argument has, in any event, no bearing whatsoever on the validity of the actual provisions of law (NY Const. art VI, §25[b]; Judiciary Law §23) which the plaintiffs challenge. We again express our inability to follow the argument that certain otherwise valid provisions of New York State law must be set aside solely because of an allegedly invidious distinction made in an unrelated Federal law. Assuming, for the moment, that the Plaintiffs, as members of a class consisting of elected judges, had a valid argument that they have been subjected to invidious discrimination, it would seem to us that their quest for judicial relief should have involved a challenge to the source of that discrimination, i.e., the Federal law referred to above, upon the

premise that the distinction contained in that law is, as applied to them, irrational.

What has possibly led our dissenting colleague into disagreement is the evidence in this record that certain elected judges in the State of New York occupy positions which, in all respects, are identical to those occupied by other appointed judges. It is suggested that as the result of the interplay between Federal law (29 USC §630[f]) and State law (NY Const. art VI, §25[b]; Judiciary Law §23), the elected judges are afforded less favorable treatment than their similarly situated appointed colleagues, and that this situation conclusively shows that a violation of equal protection has occurred. The remedy for this supposed violation of the Equal Protection Clause, according to our dissenting colleague, would be to

enjoin the defendants from enforcing the provisions of NY Constitution article VI, §25(b), even though it is conceded that the provisions of State Law are valid.

We gather that the position actually being advocated in the dissent is that the distinction between elective and nonelective State officers, contained in 29 USC §630(f) is, as applied to all elected judges, unconstitutional, and that all elected judges must therefore be treated under Federal age discrimination law as though they were appointed. Federal law would them entirely Pre-empt NY Constitution article VI, §25(b) of our State Constitution, so that the injunctive relief called for in the dissent would be warranted.

This analysis, of course, assumes that we have the power to invalidate part of a Federal statute (the exemption from age

discrimination law applicable to elected State judges), even though the plaintiffs do not request such relief. Further, this analysis fails to explain why the federally-created distinction between elected and appointed officers should be held unconstitutional as applied to all elected judges, even though it is clear that not all elected judges can be described as comparable to any particular class of appointed judges. Supreme Court justices, for example, cannot, as a class, point to any group of appointed judges who could be viewed as holding similar positions. Thus, the application of 29 USC §630(f) to this particular subclass of elected judges does not result in a disparate treatment of "similar situated" judges.

It might be argued that the distinction between elected and appointed officials

contained in 29 USC §610(f) could be held unconstitutional as applied to those elected judges who can identify a group of "similarly situated" appointed judges. However, even this argument is flawed since it fails to take into account the fact that the result complained of - the disparate treatment of supposedly identically situated persons - is not caused by the presence, in any of the provisions of law under review, of any invidious distinction; rather, this result is caused by the historical and political circumstance in New York that, in certain cases, some judges of certain courts are elected, while other judges of the same court are appointed.

For example, Family Court judges within the City of New York, are appointed, while Family Court judges outside the city

are elected (see, NY Const. art VI, §13[a]). However, the fact that New York's constitutional scheme for distinguishing between those judgeships that are to be filled by election and those that are to be filled by appointment follows no immediately discernable pattern does not furnish a basis upon which to condemn certain distinctions that are in fact rationally based, which are found elsewhere in New York or Federal law.

Thus, while we appreciate that, for example, a Family Court Judge from Westchester, approaching the age of 70, may feel aggrieved by application of the mandatory retirement provisions of New York law, even as colleagues in the City of New York are exempt from similar treatment, we cannot remedy this injustice by invalidating provisions of law which, in and of themselves, are not offensive to the

US Constitution. The real source of the injustice claimed herein is not in the constitutional and statutory provisions which the plaintiffs challenge, but rather, in the seemingly random provisions of the NY Constitution governing which judicial offices are to be elective and which are to be appointive. If all judgeships in this State were appointive, or if all judgeships in this State were elective, it would be clear that the provisions of law now under review would not be subject to any equal protection attack.

IV

For the reasons outlined above, we conclude that the review requested by the plaintiffs in this action was improperly granted, and that the order and judgment under review should be reversed insofar as appealed from by the State defendants, a declaration made in the State defendants'

favor, and the complaint otherwise dismissed. While the evidence in the record suggests that an inequitable situation may exist with respect to certain of our judicial colleagues, this inequity cannot be traced to the provisions of law which the plaintiffs would have us declared invalid.

In light of our determination, the appeal by the Westchester County Board of Elections should be dismissed as academic.

BRACKEN, BROWN, LAWRENCE and SPATT, JJ., concur.

T H O M P S O N, J.P., (concurring in Part and dissenting in part). I cannot agree with my learned colleagues in the majority that the posture on which the instant matter is presented before us serves to deprive the plaintiffs of a

remedy which would adequately address the profoundly unreasonable and inequitable application to them, as elected Judges in New York State, of a recent amendment to the Federal Age Discrimination in Employment Act (hereinafter the ADEA) (29 USC §623, et seq.). The ADEA provision, as amended, bars employment discrimination against individuals within its coverage who have attained the age of 40 years or older. By the inclusion within the protected class of individuals who have reached the age of 70 years or older, the ADEA is placed in direct conflict with the New York State constitutional and statutory provisions (NY Const. art VI, §25(b); Judiciary Law §23) which mandate the retirement of Judges at the age of 70 years. I believe the majority correctly determines the validity of NY Constitution article VI, §25(b) and Judiciary Law §23, and I would, therefore,

reverse so much of the order and judgment appealed from as declared those provisions to be unconstitutional. However, I strongly believe that the application of the ADEA, as interpreted by the New York State Administrative Board of the Courts in a formal opinion, to exclude from the ADEA's protection elected judges in New York State, has no rational basis and is a conspicuous denial of equal protection of the laws to these plaintiffs. Therefore, I would enjoin the State from compelling the plaintiffs' involuntary retirement by reason of age pursuant to the State's mandatory retirement provisions. To the extent that the majority opinion runs contrary to this conclusion, I respectfully dissent.

The operative facts of this matter are fully set forth in the opinion of the majority and need not be duplicated here.

Suffice it to say that the key issue, as crystallized by the parties' contentions, is whether the exclusion of the plaintiffs from the class protected by the ADEA amendment lacks a rational basis and thus offends the Equal Protection Clause of the Fourteenth Amendment of the US Constitution.

In order to place this matter in historical perspective, any discussion of this issue must begin with the seminal case of Maresca v Cuomo (64 NY2d 242, appeal dismissed, ____ US ____, 106 S Ct 34) in which the Court of Appeals determined that both Judiciary Law §23 and NY Constitution article VI, §25(b) requiring certain judges of the State to retire at age 70 was rationally related to some or all of seven enumerated State interests. Since the court, pursuant to traditional equal protection analysis, found the age

limitation contained in the challenged provisions of this State's constitutional and statutory law to have a rational basis, it rejected a constitutional challenge premised upon both due process and equal protection grounds. While Maresca may have continued vitality with respect to the State's mandatory retirement provision, the effects of the recent amendment to the Federal ADEA upon the plaintiffs at bar takes the instant matter outside the simple analysis employed in Maresca. Therefore, contrary to the views expressed by the majority, the Maresca holding is not an absolute bar to the fashioning of a remedy for these plaintiffs.

Prior to January 1, 1987, the ADEA barred employment discrimination against individuals between the ages of 40 and 70, thereby having no impact upon New York's mandatory retirement legislation. However,

effective January 1, 1987, the ADEA was amended so as to remove the upper age limit, thus affording protection to covered employees who have simply met the lower age requirement of 40.

Following the ADEA's amendment, the New York State Administrative Board of the Courts (hereinafter the board) construed the Federal ADEA, am amended, to prohibit the mandatory retirement at age 70 of appointed State judges during their terms of office, but to offer no similar protection to elected State judges. The board's interpretation is founded upon 29 USC §610(f) which provides as follows:

> "(f) The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level

> or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include emPloyees subject to the civil service laws of a State government, governmental agency, or political subdivision, The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country".

The exemption provided for persons elected to public office created a distinction between elected and appointed judges which lies at the heart of the instant challenge. On or about May 26, 1987, the Chief Administrative Judge of the New York Office of Court Administration, Albert M. Rosenblatt, a named defendant in this action, notified judges throughout the Stats of the formal opinion of the board.

I would note that neither the majority nor any party to this action seriously disputes the pre-emption of this State's

mandatory retirement provisions with respect to appointed judges. Although it has been administratively determined that the Federal ADEA, as amended, supersedes the mandator retirement provisions of the NY Constitution and the New York State Judiciary Law to the extent that they conflict,[1] this issue has never been litigated and hence, there exists no formal declaration by any court of law regarding the pre-emption of this State's mandatory retirement provisions with respect to appointed judges. However, insofar as a

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[1]In addition to the recent opinion and findings issued by the New York State Administrative Board of the Courts, the Equal Employment Opportunity Commission (hereinafter EEOC) has likewise issued an opinion as to the applicability of the ADEA to appointed State and local court judges. The EEOC concluded that appointed State and local court judges are "employees" within the definition of that term as found at 29 USC §630(f), and that the exemptions set forth therein would not generally be applicable to an appointed State or local judgeship.

conflict is clearly created by the plain language of the ADEA as amended, we are constrained by the Supremacy Clause of US Constitution article VI to acknowledge the conflict between Federal and State law, to employ the provisions of the Federal ADEA, and override the provisions of the State law to the extent of any conflict (see, Burbank v. Lockheed Air Terminal, 411 US 624; Hines v Davidowitz, 312 US 52).

The majority's position and, indeed that of the defendants, is that to the extent the State's mandatory retirement Policy has not been pre-empted by the ADEA, the State is free to implement that policy, assuming it is otherwise valid. To that end, the majority rests upon the declaration in Maresco v Cuomo (supra) of the validity of New York's mandatory retirement provisions, and claims that "[n]othing has occurred during the few

years since Maresca was decided which would, in any way, tend to detract from the cogency of those reasons (for the age-based limitations or otherwise call into question the analysis or the result reached in that case". I vigorously disagree with this position since the mandatory retirement policy at issue in Maresca is not the issue with which we are faced on this appeal. In Maresca, the court determined that there was a rational basis for the mandatory retirement age limitation as it applied to all State judges; in the instant case, we are confronting a State policy which requires that all elected judges retire at the age of 70, while permitting their appointed counterparts to complete their judicial terms well beyond the age of 70. It is this policy, the validity of which the majority apparently believes is not properly before us, that I find to be

irrational and lacking a rational basis necessary to withstand equal protection analysis. Nor do I believe that we should avoid passing on this issue on the basis of a hypertechnical analysis of the Federal ADEA as interpreted in the formal opinion of the board which gave voice and substance to a new State policy on age discrimination with respect to the State's judges.

When reviewing a statute or constitutional provision under the rational basis test, the law will be upheld if it is found that there exists a rational relationship to a permissible State interest (see, Dandridge v Williams, 397 US 471). However, even under a rational basis standard, disparate treatment of those similarly situated will not be tolerated without justification (See, Johnson v Smith, 696 F2d 1134; Flowers v Webb, 575 F Supp 1450). In this regard, if the group

to which the plaintiffs belong is similarly situated to the group receiving the benefit to which they claim entitlement, then a rational reason must exist for the disparity (see, Vance v Bradley, 440 US 93; Eisenstadt v Baird, 405 US 438).

In the matter before us, I do not believe that the narrow distinction as to whether a Judge is elected or appointed is sufficient to justify the disparity in their treatment. Elected and appointed judges perform the identical job, handle a caseload of equal magnitude, drawing the same salary and compensation, and are held to the same standards of judicial responsibility. In this regard, I find no rational State interest whatsoever in the unequal treatment of members of our State judiciary who function in identical capacities.

The irrationality of this State's policy permitting enforcement of New York's mandatory retirement rule as against elected Judges while exempting, by reason of the Federal ADEA, those judges who are appointed, is evidenced by the unfairly disparate treatment accorded Family Court Judges within the City of New York (who are appointed to their judgeships) from their (who are elected to their judicial posts). Merely because of geographic factors, the New York City judges may serve well beyond the age of 70, while their similarly-situated colleagues outside New York City are summarily forced to step down at age 70.

Equally irrational is the proposition that an appointed lower court Judge, who is designated and serves as an Acting Supreme Court Justice, would be permitted to remain on the bench beyond the age of 70 without

going through any certification process, while an elected Supreme Court Justice would be forced to retire at age 70, with only the possibility of serving for a limited term as a retired Justice providing he or she is certified.

Such disparate treatment of identically situated individuals may not be discounted, as the majority suggests, as simply an aberration of our structured system of the judiciary in which certain Judges are elected and some are appointed. Nor may such inequities as exist be explained by the Maresca decision upholding New York's mandatory retirement policy. In fact, this pattern of injustice in the State's retirement policy is particularly disturbing when viewed in the light of the Maresca decision upholding New York's mandatory retirement policy. In fact, this pattern of injustice in the State's

retirement policy is particularly disturbing when viewed in the light of the Maresca court's language that the very reason for permitting certification of Supreme Court justices and not lower court judges (pursuant to Judiciary Law §115) was to insure the retention of experienced judicial personnel in the Supreme Court. Thus, what originated as a system under which elected Supreme Court justices could ostensibly sit on the bench beyond their appointed counterparts, has evolved into a system under which appointed lower court judges could ultimately remain on the bench well beyond the years of their elected colleagues.

Turning then to the rationale underlying the distinction between officials who are appointed and those who are elected, I do not dispute the majority's assertion that such distinction

arises by operation of Federal law. However, I strongly doubt that the exemption for elected officials, which was carved out in a 1974 amendment to the ADEA (see, Pub L 93-259, §28[a][3]) was ever intended to foster such a blatantly inequitable result as that with which we are now faced.

Although "the legislative history behind the (1974) amendment to the ADEA is virtually nonexistent" (see, E.E.O.C. v County of Calumet, 686 F2d 1249), the language in 29 USC §610(f) is identical to that contained in title VII of the Civil Rights Act of 1964, as amended in 1972 (42 USC §2000e[f]). Consequently, the legislative history of that 1972 amendment to title VII may appropriately be considered here in establishing legislative intent (see, Lorillard v Pons, 434 US 575; E.E.O.C v Board of Trustees, 723 F2d 509).

The exemption of elected officials from the definition of the term "employee" in title VII was intended in part to preserve the right of the voters of a State "to select their own officials and select their own employees" without restriction by the Federal government (see, 118 Cong Rec, at 4483 [February 17, 1972]). A review of the Congressional Record discloses no intention whatsoever that this exemption was intended to sanction age discrimination against elected officials only.

In sum, while I concur in the majority's finding that NY Constitution article VI, §25(b) and Judiciary Law §23 are constitutional, I conclude that the application of the Federal ADEA, as amended in January 1987) and as interpreted in the formal opinion of the board, are patently violative of the plaintiffs' rights under the Equal Protection Clause of the

Fourteenth Amendment of the US Constitution.

MEMORANDUM

(IAS, PART I)

SUPREME COURT : KINGS COUNTY

RALPH DIAMOND, BENJAMIN F. NOLAN, SAMUEL GREENSTEIN, BARBARA KAISER and BENJAMIN GLASS, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, State Comptroller, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, ALBERT M. ROSENBLATT as Chief Administrative Judge of New York State Office of Court Administration, THE NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, WESTCHESTER COUNTY BOARD OF ELECTIONS,

Defendants.

BY FRANKLIN W. MORTON, JR.J

DATED September 3, 1987

Index No. 18698/87

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MEMORANDUM

(IAS, PART I)

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Defendants.

BY FRANKLIN W. MORTON, JR.J

DATED September 3, 1987

Index No. 18698/87

Plaintiffs, judges of the various courts of the State of New York, seek declaratory and injunctive relief declaring that the statutes mandating their

involuntary retirement at the age of 70, are illegal and unconstitutional, denying their due process and equal protection rights under the New York State and United States Constitutions.

Plaintiffs move for temporary injunctive relief pending the resolution of this action (under Article 63 of the CPLR) and class action certification (pursuant to Article 9 of the CPLR).

Defendants, with the consent of the plaintiffs and approval of the court, orally cross-moved in open court to dismiss the complaint for failure to state a cause of action and to declare the challenged constitutional and statutory provisions valid.

The Office of Court Administration appeared and indicated that it would not presently participate in the action but

noted on the record that it objected to the granting of a preliminary injunction against it.

The uncontradicted facts are as follows:

Plaintiff Benjamin Nolan, a New York City Civil Court Judge, and Barbara Kaiser, a New York State Family Court Judge from Westchester County, will both reach 70 years of age this year and thus will be compelled to retire on December 31, 1987 by virtue of the challenged provisions herein (Article VI, Section 25(b) of the New York State Constitution and Section 23 of the Judiciary Law), although in each case both terms expire December 31, 1992.

Plaintiff, Justice Benjamin Glass, is 76 years of age, having been born on July 14, 1911 and elected as a Civil Court Judge of the City of New York in November 1976

for a term commencing January 1, 1977 and expiring December 31, 1986. He was thereafter elected as a Supreme Court Justice of the State of New York, County of Queens in November 1980 for a term commencing January 1, 1981 and expiring January 1, 1984.

On July 14, 1984, plaintiff Glass became 70 years of age and on or about January 1, 1982, he was certified as a Supreme Court Justice, County of Queens for a term of two years from January 1, 1982 to December 31, 1983, and thereafter re-certified from January 1, 1984 to December 31, 1985, and from January 1, 1986 until December 31, 1987 when the final certification period ends, all pursuant to Judiciary Law 115.

The remaining two named plaintiffs, Judge Greenstein whose term expires

December 31, 1989 and Judge Diamond whose term expires December 31, 1995, aged 64 and 68, respectively, also join in this action.

Based upon these facts, plaintiffs bring this action and move for class action certification.

The papers submitted show that plaintiffs have not satisfied the satisfactory requirements for class action relief under Article 9 of the CPLR; they have merely set forth the conclusory assertions that this case comes within the statutory provisions necessary for the court to grant class action relief; they have not supported those allegations with the factual proof required (Jennings v Domestic Finance Corp., 55 AD2d 832; Brandon v Chefetz, 121 Misc 2d 54).

Moreover, this action involves a governmental practice, and under these circumstances, class action certification is inappropriate since a presumption exists that any determination made will be binding upon the state in similar cases and subsequent petitioners will be adequately protected under the principle of "stare decisis (Matter of Rivera v Trimarco, 36 NY2d 747; Jones v Berman, 37 NY2d 42, 47).

Furthermore, where a plaintiff seeks a declaration of unconstitutionality there will generally be no need for class action status, if one person gets [sic] reief, it will inure to the benefit of all (McKinney's Con Law, Book 7B, Prac Com, by MCLaughlin, p 326, §901:6, citing Brito v Ross, 53 AD2d 414; Matter of Shook v Levine, 49 AD2d 238).

Illustrative of the aforesaid principle is the case of Galvan v Levine (42 F2d 1255, 1261), where the Circuit Court in denying class action relief stated:

> "Insofar as the relief sought is prohibitory, an action seeking declaratory and injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archtype of one where class action designation is largely a formality . . ."

Under these circumstances, the court finds that class action is not the superior method of determining this controversy and accordingly the motion for class action certification is denied (see CPLR §901[5]), however, the case may proceed with the plaintiffs affected and the result will inure to all those similarly situated.

In considering defendants' motion to dismiss the complaint for insufficiency, the material allegations of the complaint

must be deemed to be true (Guggenheim v Ginsburg, 43 NY2d 268; the pleading must be liberally construed in support of a holding of sufficiency; Condon v Assoc. Hosital Service of New York, 287 NY 411, 414; and if the complaint is adequate to state some cause of action, it is not subject to dismissal (Niagara Falls Power Co. v White, 272 NY 422).

Moreover, on a motion to dismiss a declaratory action, the issue is whether or not plaintiff has presented a proper case for a declaration of rights regardless of whether the ultimate declaration will be in favor of the plaintiff (Hallock v State, 309 AD2d 172, affd 32 NY2d 599), or, as stated differently, motions prior to the answer to dismiss a complaint seeking declaratory judgment presents for determination only whether a good cause of

action for declaratory judgment is stated and does not raise questions as to whether judgment should be as claimed by plaintiff (Playboy Club, Inc. v Hostetter, 40 Misc 2d 449, affd 19 AD2d 449, affd 14 NY2d 822).

In view of the aforesaid principles, the court finds the complaint sufficiently states a cause of action as will be more fully shown hereafter.

The immediate and only issue before the court at this time is plaintiffs' application for preliminary injunctive relief, the substantive issues to be determined after trial or motion for judgment (Schacht v City of New York, 14 AD2d 526 [#20].)

The preliminary injunction is a drastic remedy addressed to the discretion of the court (James v Board of Education, 42 NY2d 357). The power is not inherent in the

court but is founded on statute (Article 63 of the CPLR).

The object of any injunction, pendent lite, is to prevent irreparable injury pending final ascertainment of a right; thus, the court should give greater weight and consideration to the danger threatened in the consequences thereof, having first determined that plaintiff on his or her own papers has established prima facie his or her right to the ultimate relief or judgment demanded, than to questions concerned with the probability of plaintiff being [sic] abe to prove his or her case (Bisca v Bisca, 108 Misc 2d 227).

Stated differently, the court in Sullivan v McFetridge (55 NYS2d 511, 524) elaborated as follows:

> ". . . A preliminary injunction has no res judicata or collateral effect; a judgment granting

> preliminary injunction is an interlocutory judgment; by its very nature, it is not a final judgment. On a motion for preliminary injunction, there is no final determination or finding of facts. Its sole object is to observe the judgment in controversy in the then existing condition. It does not determine any question of right, but is intended merely to prevent a further perpretation of wrong or doing of an act whereby the right in controversy may be materially injured or endangered until a full and deliberate investigation of the case is afforded to the party."

The aforesaid principle notwithstanding, a preliminary injunction will not be granted unless plaintiffs demonstrate a strong likelihood of ultimate success in the underlying action and establish that there exists a risk of irreparable harm (Frinzese v Frinzese, 108 Misc 2d 154). The action being equitable in nature, the probability of hardship to each of the parties from the granting or denial of the application must likewise be weighed in the

balance (Finger Lakes Health System v St. Josephs Hospital, 81 AD2d 403; see, also, Nassau Roofing & Sheet Metal Co. v Facilities, 70 AD2d 721; Tucker v Toia, 54 AD2d 322). In addition, it must appear on the face of the complaint or moving papers that the applicant has some kind of cause of action, prima facie, against the opposite party (Weisner v 791 Park Ave. Corp., 7 AD2d 75).

Upon this record the court is satisfied that plaintiffs have sustained their burden sufficiently for the court to exercise its discretion to grant plaintiffs the temporary injunction prayed for.

The court finds that the harm threatened, specifically with respect to plaintiffs Nolan and Kaiser, is irreparable: new elections will disenfranchise these plaintiffs from

forever being returned to their position. Such harm cannot be repaired or restored; the expected harm is actual and imminent (Kamakazi Corp. v Robbins Music (534 F Supp 57, 59).

In addition, in [sic] consdidering an application for a temporary injunction, the court must consider the equities and balance the conveniences between the parties (Gramazio v Gramazio, 108 Misc 2d 579). When the loss to the moving party is far more serious and irreparable than the loss to the party to be enjoined, if the injunction is granted, injunctive relief should be granted. In the case at bar the harsh result that would be imposed upon the affected plaintiffs (irreparable loss of their positions), presents a far more serious problem than any harm that would be visited upon defendants; clearly, the

balance of equities lies in favor of the plaintiffs.

The court is also convinced that the case at bar poses some serious legal and constitutional problems and that on the face of the complaint and supporting affidavits and documentation, plaintiffs have "prima facie" set forth some kind of action against defendants; there is a probability that plaintiffs will ultimately succeed (Weisner v 791 Park ave. Corp., supra).

The Age Discrimination In Employment Act (ADEA, 29 USC, sections 623, 630[f] and 631), here involved, was amended in January of 1987, which removed age as a factor in the hiring and discharging of employees or with respect to other conditions of employment, except elected officials who

were not included in the remedial amendment (29 USC 631[a]).

In determining the effect of the amendment, the Administrative Board of the Courts declared that elected judges and Supreme Court judges certified for continued service are excepted from the broad sweep of the statute and must retire at age 70, while appointed judges are included within the statute and therefore may no longer be mandatorily retired at age 70.

Plaintiffs claim that a classification based on such an arbitrary and tenuous factor as whether a judge is elected or appointed violates their constitutional rights. The court is convinced that plaintiffs raise a rather serious constitutional objection which has merit

sufficient to sustain their motion for temporary injunctive relief.

The resultant indiscriminate classification between elected and appointed judges for purposes of retirement seems to lack any rational basis in law or in logic. The rule has often been stated that the classification must rest upon some ground of difference having a fair and substantial relation to the subject of the legislation (Royster Guono Co. v Virginia, 253 US 412, 415; Louisville Gas and Electric Co. v Coleman, 277 US 32, 37; Allied Stores v Bowers, 358 US 522, 527). The attempted classification herein seems purely arbitrary, not rationally related to the achievement of a legitimate state purpose, i.e., mandatory retirement based on age. It seems that the subject edict arbitrarily treats similarly situated

judges differently, in a discriminatory manner without a rational basis to support the disparate treatment; therefore, it appears to run afoul of the equal protection clause of the Constitution.

Moreover, no argument is advanced by defendants that the inequality is justified for any economic or social policy reasons. That the exemption of elected officials from the benefits of the statute was intended to preserve the right of a state through its voters, to select its own officers and its own employees without restriction by the Federal judiciary, as suggested by defendants, does not seem to be valid state interest to justify the classifiction in question under the circumstances herein.

The difference in treatment seems palpably arbitrary and amounts to an

invidious discrimination (see, Lahnshausen v Lake Shore Auto Parts Co., 410 US 356, 359; Shapiro v City of New York, 32 NY2d 96, 103; Allied Stores v Bowers, supra).

An illustration of the irrational approach of defendants' action is clearly borne out in the situation involving the Family Court judges. In New York State, judges of the Family Court outside New York City are elected; in the City of New York those same judges are appointed. Thus, under the present circumstances, Family Court judges outside the City of New York who are elected and who operate under the same jurisdictional limits and perform exactly the same duties as those judges in New York City who are appointed, must retire upon reaching the age of 70, while the New York City Family Court judges who are appointed could continue to serve

beyond age 70. Such a distinction would seem to be constitutionally suspect. Clearly, there seems to be a valid basis, "prima facie," for plaintiffs' claim of unconstitutionality sufficient to sustain a motion for a temporary injunction.

The constitutional analysis in Maresca v Cuomo (64 NY2d 242), cited and relied upon by defendants, is not relevant to the facts at bar where the issue presented is the constitutional validity of directing mandatory retirement of judges on the narrow basis of whether a judge is elected or appointed; that issue was not before the Court of Appeals in Maresca, supra -- that case turned only on the rationality of involuntary retirement at the age of 70.

Moreover, the legitimate state interest spelled out by the court in Maresca, supra justifying the mandatory retirement of

judges in all the courts at the age of 70, except the Supreme Court and Court of Appeals, whose services may be recertified beyond the age of 70, does not find any relevancy to the facts at bar.

Accordingly, defendants' motion to dismiss the complaint is denied and defendants are directed to interpose their answer within 10 days of the order to be entered hereon.

Plaintiffs' motion for a temporary injunction is granted and plaintiffs are directed to post an undertaking as required and mandated under section 6312 of the CPLR in the sum of $100,000.

Settle order.

J.S.C.

COURT OF APPEALS
STATE OF NEW YORK

----------x

RALPH DIAMOND, BENJAMIN F. NOLAN, SAMUEL GREENSTEIN, BARBARA KAISER and BENJAMIN GLASS, individually and on behalf of all others similarly situated,

NOTICE OF APPEAL

Plaintiffs-Appellants,

- against -

Kings Co. Index No. 18698/87

MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, State Comptroller, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, ALBERT M. ROSENBLATT as Chief Administrative Judge of New York State Office of Court Administration, THE NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS,

Defendants-Appellees,

- against -

WESTCHESTER COUNTY BOARD OF ELECTIONS,

Defendant-Appellee-Cross Appellant.

----------x

SIRS:

PLEASE TAKE NOTICE, that the above-named plaintiffs, Ralph Diamond, Benjamin F. Nolan, Samuel Greenstein, Barbara Kaiser and Benjamin Glass, individually and on behalf of all others simularly situated, hereby appeal to the Supreme Court of the United States from the Order of the State of New York Court of Appeals, entered in the office of the Clerk of said Court on October 15, 1987, and from each and every part thereof. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: Queens, New York
November 5, 1987

Yours etc.,

GIAIMO, VREEBURG & ROSEN
Attorneys for
Plaintiff-Appellants
Office and P.O. Address
118-21 Queens Boulevard
Forest Hills, New York
11375 718-261-6200

To: Robert Abrams
Attorney General of the
State of New York
Attorney for Appellees
Cuomo, Regan and Retirement System
120 Broadway
New York, New York 10271

Michael Colodner, Esq.
Attorney for Appellee
Office of Court Administration
270 Broadway-Room 1400
New York, New York 10007

Henry J. Logan
Attorney for Appellee
Westchester County Board
of Elections
Michaelian Office Building
148 Martine Avenue - Room 600
White Plains, New York 10601

COURT OF APPEALS
STATE OF NEW YORK
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RALPH DIAMOND, BENJAMIN F. NOLAN, SAMUEL GREENSTEIN, BARBARA KAISER and BENJAMIN GLASS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

- against -

AFFIDAVIT OF SERVICE

Kings Co. Index No. 18698/87

MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, State Comptroller, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, ALBERT M. ROSENBLATT as Chief Administrative Judge of New York State Office of Court Administration, THE NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS,

Defendants-Appellees,

- against -

WESTCHESTER COUNTY BOARD OF ELECTIONS,

Defendant-Appellee-Cross Appellant.

----------x

STATE OF NEW YORK)
COUNTY OF QUEENS) ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Briarwood, New York.

That on November 5, 1987 deponent served the within Notice of Appeal on

Robert Abrams, Attorney General of the State of New York, Attorney for Appellees Cuomo, Regan and Retirement System at 120 Broadway, New York, New York 10271.

Michael Colodner, Esq., Attorney for Appellee Office of Court Administration, at 270 Broadway, Room 1400, New York, New York 10007.

Henry J. Logan, Esq., Attorney for Appellee Westchester County Board of Elections, Michaelian Office Building, 148

Martine Avenue, Room 600, White Plains, New York 10601.

The address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid [sic] proberly addressed wrapper, in a post office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

/S/
E. ALEX BROWER

Sworn to me this 5th
day of November, 1987.

/S/
RICHARD GRAVER
NOTARY PUBLIC, State of New York
No. 41-4876839
Qualified in Queens County
Commission Expires Oct. 29, 1988

New York Judiciary Law
Section 23

§23. Age limitation on term of judicial office

No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of December next after he shall be seventy years of age, except that a judge or justice in office or elected or appointed to office at the effective date of this section,[1] as to whom no provision limiting his right to hold office to the close of the year following his attaining the age of seventy years was applicable prior to the effective date of this section, may continue in office during the term for which he was elected or appointed.

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[1]April 9, 1945.

New York State Constitution
Article VI, Section 25 Subd.(b)

§25. [Compensation and retirement of judges and justices; continuation of services after retirement]

b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reached the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six. A retired judge or justice shall be subject to assignment by the appellate division of the supreme court of the judicial department of his residence. Any retired justice of the supreme court who had been designated to

and served as a justice of any appellate division immediately preceding his reaching the age of seventy shall be eligible for designation by the governor as a temporary or additional justice of the appellate division. A retired judge or justice shall not be counted in determining the number of justices in a judicial district for the purposes of section six subdivision d of this article.

SUPREME COURT of the UNITED STATES

No. A-513

RALPH DIAMOND, ET AL.,
Applicants

v.

MARIO CUOMO, GOVERNOR OF NEW YORK, ET AL.,

O R D E R

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for docketing an appeal in the above entitled cause be, and the same is hereby, extended to and including February 13, 1988.

s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 5th day of January, 1988.